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Tench C. Coxe III

sured *in full* for the amount of the loss. Furthermore, the probability is remote that the insurer, in such a case, would pray for damages in excess of the amount paid the insured. To do so would, it seems, admit partial subrogation only. And, it is even harder to conceive a jury verdict in excess of the amount the insured had accepted as full payment of his claim against the wrong-doer. The verdict is more likely to be less.[30]

The question remains whether a partially subrogated insurer can avoid joinder in a suit by the insured simply by failing, under agreement with the insured or otherwise, to indemnify the insured to any degree. The general language of the cases indicates that it can do so. *Actual payment*[31] is regarded by our court as the necessary basis for subrogation. It would seem, then, that a mere obligation to pay would not give rise to a claim in the insurer, and that, consequently, joinder of an insurer who had made no payment to the insured is at odds with the principles of subrogation.

It is submitted, however, that, other things being equal, there is little practical difference in a paid and non-paid situation. In either case the insurer has a very distinct interest in the subject matter of the suit.

It seems entirely possible that if an insurer makes partial settlement after the insured has brought the action, but before trial, the insurer could at that time properly be made a party.

D. STEPHEN JONES

Real Property—Powers of Attorney—Wife's Conveyance of Her Realty By Virtue of Husband's Power of Attorney

W, a married woman, owns real estate in North Carolina. Her husband, *H*, is in the armed forces. Before departing for a tour of duty in Korea *H* executes, in proper form, a power of attorney[1] authorizing *W* to assent in his behalf to conveyances of her separate realty. Three months later, while *H* is overseas, *W* conveys a house and lot to *X*, executing the deed both for herself and on behalf of *H* by virtue of his power of attorney. Shortly thereafter *W* dies and *H* is killed in action.

[30] Baer, *The Relative Roles of Legal Rules And Non-Legal Factors In Accident Litigation*, 31 N. C. L. REV. 46, 55 (1952).

[31] An advancement by the insurer to the insured "pending collection from the carrier or other bailee" was said to be actual payment. Cunningham v. Seaboard R. R., 139 N. C. 427, 433, 51 S. E. 1029, 1030 (1905).

[1] It should be noted at the outset that the power under discussion here is not the general type whereby *H* authorizes *W* to convey *his* land, but is a special power granted to *W* by *H* to join on his behalf in conveyances of *her separate* realty. See Toulmin v. Heidelberg, 32 Miss. 268 (1856) where it was held that a power to execute conveyances of *H's* land was not the same as a power to join with the wife in a conveyance of her land. For a general discussion with respect to scope of powers of attorney, see 2 C. J. S. Agency §§ 98 and 99 (1936).

W's only heir at law brings an action against *X* to recover the property. Who will succeed?

While at common law the wife was permitted to retain the fee to her lands, she could not convey the same.[2] At an early date, however, a married woman in the Colonies was allowed by local custom or statute to convey her real estate by deed in which the husband joined and which she acknowledge by privy examination.[3] That joinder requirement was incorporated in the North Carolina Constitution by a provision[4] which states, in effect, that a married woman may convey her real[5] and personal[6] property as though unmarried *if she gets the written assent of her husband.*[7] This constitutional provision has been implemented by a statute[8] declaring that the wife's conveyance *must be executed by herself and her husband.* Since no case has yet been decided by the North Carolina Supreme Court construing the constitutional provision and statutes as they concern the validity of a married woman's conveyance of her separate real estate, executed by her both on her own behalf and on behalf of her husband by virtue of his power of attorney, it is appropriate to examine the manner in which this problem has been dealt with in other jurisdictions.[9]

[2] 1 POWELL ON REAL PROPERTY 430 (1949); 3 VERNIER, AMERICAN FAMILY LAWS 293 (1935).

[3] 3 VERNIER, AMERICAN FAMILY LAWS 293 (1935).

[4] N. C. CONST. Art. X, § 6. "The real and personal property of any female in this state acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, should be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations, or engagements of her husband, and may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried."

[5] This provision applies to equitable as well as legal estates in land owned by the wife. Clayton v. Rose, 87 N. C. 106 (1882). It applies also to the release by the wife of her dower. Slocumb v. Ray, 123 N. C. 571, 31 S. E. 829 (1898).

[6] In Vann v. Edwards, 135 N. C. 661, 47 S. E. 784 (1904), *overruling* Walton v. Bristol, 125 N. C. 419, 34 S. E. 544 (1899), it was held that the wife could dispose of her separate property without the consent of her husband, unless the law requires its disposition to be evidenced by a conveyance or writing. Later, in Rea v. Rea, 156 N. C. 529, 72 S. E. 873 (1911), the constitutional provision was virtually nullified as to personalty, it being held that the wife has an unrestricted power to convey her personal property.

[7] Exceptions to the general rule exist in the following instances: A woman living separate from her husband under a divorce or deed of separation executed by husband and wife, or whose husband has been declared an idiot or lunatic, may convey without her husband's consent. N. C. GEN. STAT. § 52-5 (1943, recompiled 1950). A woman whose husband abandons her may convey without her husband's consent. N. C. GEN. STAT. § 52-6 (1943, recompiled 1950).

[8] "Every conveyance, power of attorney, or other instrument affecting the estate, right or title of any married woman in lands, tenements or hereditaments must be executed by such married woman and her husband . . ." N. C. GEN. STAT. § 39-7 (1943, recompiled 1950).

[9] At the present time only six states—Alabama, Florida, Indiana, Pennsylvania, North Carolina, and Texas—require the husband's joinder in order that the wife may make an effective conveyance of her interest in realty. In three of these—Florida, Indiana, and Pennsylvania—a statute provides that the husband may give

Such a conveyance was held invalid in a California case[10] decided under a joinder statute[11] similar to that in North Carolina. The California court held that the purpose of the joinder requirement was to insure the wife the protection of her husband against wily third parties who might seek to profit by taking advantage of her inexperience in real estate transactions. To make this protection effectual the husband should exercise his judgment in respect to each transaction of the wife with respect to her real estate. Exercise of this discretion through the medium of a power of attorney granted the wife in advance would, in effect, operate as an abdication by the husband of that discretionary function. The husband should exercise that discretion by signing each deed himself.

Conversely, in a Texas case[12] decided under a statute[13] requiring that there be a joint conveyance from the husband and wife for the wife's separate realty, a conveyance of her property executed by the wife on behalf of her husband by virtue of his power of attorney was held valid. This court found nothing in its previous decisions declaring it essential for the husband to counsel the wife in respect to her real estate transfers. Furthermore, the statute did not specifically indicate in what way the husband should effect his joinder, whether in person or by an attorney in fact. Since in Texas the husband and wife could convey the wife's separate property through an agent by their joint power of attorney, the court thought that the husband could, by his separate power of attorney, authorize another to execute for him, jointly with his wife, a conveyance of her property.[14] If this power could be delegated to a stranger, why not to the wife? The court saw no harm in leaving the manner in which the joint conveyance was to be effected to the discretion of the parties.

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the wife his power of attorney authorizing her to execute for him, and in his name, jointly with herself, a deed of conveyance of her separate property. FLA. STAT. ANN. 708.09 (1944); IND. STAT. ANN. 56-10 (Burns supp. 1951); PA. STAT. ANN. tit. 48 § 32 (1931). In a fourth, Texas, the conveyance in question has been upheld by judicial decision. Rogers v. Roberts, 13 Tex. Civ. App. 140, 35 S. W. 76 (1896). In Alabama and North Carolina there appears to be neither statute nor reported decision with respect to this particular matter.

[10] Meagher v. Thompson, 49 Calif. 189 (1874).

[11] ". . . no alienation, sale or conveyance of the real property of the wife . . . shall be valid for any purpose unless the same be made by an instrument in writing, executed by the husband and wife . . ." CAL. STAT. p. 518 (1862). It should be noted, however, that the joinder requirement was abolished in California in 1872. CAL. CIV. CODE § 162 (1949).

[12] Rogers v. Roberts, 13 Tex. Civ. App. 190, 35 S. W. 76 (1896).

[13] "The husband and wife shall join in the conveyance of real estate, the separate property of the wife . . ." TEX. REV. CIV. STAT. ANN. art. 1299 (Supp. 1945).

[14] *See* Toulmin v. Heidelberg, 32 Miss. 268 (1856), decided when Mississippi had a joinder requirement, where it was stated that the husband's power authorizing his attorney to join with the wife in a conveyance of her realty would suffice to permit the wife and the husband's attorney to convey the wife's property.

If called upon to resolve the problem, it is not unlikely that the North Carolina court would look to other jurisdictions. Thus it is significant that each of the solutions indicated above is based to some extent on factors which also exist in North Carolina. For instance, as did the California court, the North Carolina court has emphasized that the purpose of the husband's joinder is not to convey an interest in the property, because he has none, but to protect the wife.[15] In order that the wife obtain this protection the North Carolina court, like the court in California, has held it necessary that the husband sign the same deed as the wife.[16] Viewed solely in the light of these considerations, in North Carolina a deed of the wife's separate property wherein she signs both for herself and on behalf of her husband would be invalid.

On the other hand, as in Texas, the North Carolina statute[17] does not indicate in what way the husband should effect his joinder, whether in person or by an attorney in fact. The North Carolina Constitution[18] requires only the written assent of the husband, and does not state whether this written assent must appear on the deed itself. Furthermore, since in North Carolina, as in Texas, the husband and wife can convey the wife's separate property through an agent by their joint power of attorney,[19] there is little doubt that the husband can, by his separate power of attorney, authorize another person, such as his real estate broker, to execute for him, jointly with his wife, a conveyance of

[15] Joiner v. Firemens Insurance Company, 6 F. Supp. 103 (M. D. N. C. 1932); Buford v. Mochy, 224 N. C. 235, 29 S. E. 2d 729 (1944); Stallings v. Walker, 176 N. C. 321, 97 S. E. 25 (1918); Ferguson v. Kinsland, 93 N. C. 337 (1885). *But see* Smith v. Bruton, 137 N. C. 79, 87, 49 S. E. 64, 67 (1904) (Dissenting opinion).

The assertion that the purpose of the husband's joinder is not to convey an interest in property does not apply to property owned by the husband and wife by the entireties, since in such a case the husband does have an interest to convey. Technically speaking, since *H* and *W* both own an interest, in order that *W* convey property owned by the entireties she needs both the power to convey *H's* interest in land and the power to join on his behalf in conveyances of her interest. Although it is true that the power to convey *H's* land does not include the power to join in conveyances of *W's* land (note 1, *supra*), it seems logical that in the case of an estate owned by the entireties, since both *H* and *W* own the same interest, *H's* grant of the power to sell that interest would necessarily include his assent to the alienation by *W*.

[16] Council v. Pridgen, 153 N. C. 444, 69 S. E. 404 (1910); Slocumb v. Ray, 123 N. C. 571, 31 S. E. 829 (1898); Green v. Bennett, 120 N. C. 394, 27 S. E. 142 (1897); Ferguson v. Kinsland, 93 N. C. 337 (1885).

In Joiner v. Firemens Insurance Company, 6 F. Supp. 103 (M. D. N. C. 1932), *overruling* Gray v. Mathis, 52 N. C. 503 (1860), it was held that it is not necessary that the husband's name be in the body of the deed.

In Bates v. Sultan, 117 N. C. 95, 23 S. E. 261 (1895) and Brinkley v. Ballance, 126 N. C. 393, 35 S. E. 631 (1900) judgments against a married woman were declared charges against her separate estate, which included land, although the husband had assented in a separate writing to the wife's charging her separate estate as security for payment of debts, non-payment of which gave rise to the judgments. The value of these cases as precedent is limited, since in neither was an actual conveyance involved.

[17] See note 8, *supra*.

[18] See note 4, *supra*.

[19] N. C. GEN. STAT. § 39-12 (1943, recompiled 1950).

her property. Why should he not be able to grant this authority to his wife?

It is submitted that North Carolina should follow the Texas rather than the California decision, which is seventy-five years old and no longer law in that jurisdiction.[20] Although the reasoning advanced as a basis for that decision, as well as for numerous North Carolina decisions requiring the husband to manifest his assent by signing each deed, has not been refuted by the North Carolina court, it could hardly be argued that it has any force today. If it is recognized that married women as a group are no longer ignorant and inexperienced, and that they are as capable as their single sisters of profitably disposing of their real estate, what justification is there for requiring them to obtain their husbands' advice with respect to their transfer of such property?

There are other considerations, not mentioned in the Texas decision, which indicate that the husband should be permitted to accomplish his joinder through a power of attorney authorizing the wife to assent to conveyances of her property on his behalf, some of which are:

(1) As hereinabove indicated,[21] such a holding would be in accord with the law in at least 46 other states.

(2) In North Carolina a married woman is free to devise[22] her property as she sees fit without consulting anyone. Likewise, she has complete freedom of disposition in respect to her personal property,[23] the value of which frequently is greater than that of her real estate. This being so, there should be no objection to her conveying her separate real estate *with the consent* of her husband, voluntarily granted in his power of attorney.

(3) Although not mentioned in the decisions[24] or statutes, it may be that one reason for retaining the joinder requirement in North Carolina is to protect the husband's curtesy consummate, or life estate in the lands of the wife in the event of her death, issue of the marriage having been born alive.[25] If this be so, the husband should be permitted to release this right if he wishes by authorizing his wife to assent to conveyances of her realty on his behalf.

(4) A policy in North Carolina is to make land freely alienable.[26]

[20] See note 11, *supra*.

[21] See note 9, *supra*.

[22] N. C. GEN. STAT. § 31-2 (1943, recompiled 1950).

[23] See note 6, *supra*.

[24] *But see* Smith v. Bruton, 137 N. C. 137 N. C. 79, 87, 49 S. E. 64, 67 (1904) (Dissenting opinion) where Chief Justice Clark declared that the constitutional provision requiring the husband's assent was intended to protect the husband's curtesy and was merely a correlative of the wife's joining in the husband's conveyances to bar her dower.

[25] For a detailed discussion of curtesy in North Carolina see McCall and Langston, *A New Intestate Succession Statute for North Carolina*. 11 N. C. L. REV. 266, 273-294 (1933).

[26] Combs v. Paul, 191 N. C. 789, 133 S. E. 93 (1926); Pritchard v. Bailey, 113 N. C. 521, 18 S. E. 668 (1893).

Since so many married men are out of the continental United States, due primarily to service in the armed forces, a procedure is needed whereby a serviceman's wife owning an interest in real estate may convey the same without it being necessary that the husband assent in person.[27] The method under discussion fills that need.

A positive decision on this matter is needed in North Carolina, both in order to cure the possible defect in titles already transferred in this manner and so that attorneys may confidently recommend this procedure to clients. Since it may take some time for a test case to reach the Supreme Court, it remains for the legislature to fill the gap by enacting legislation authorizing the wife to join on behalf of her husband by his power of attorney, as was done in Florida, Indiana, and Pennsylvania.[28] This would enable a married woman, whose husband is unavailable, to exercise the freedom of transfer which she needs should circumstances arise which make it necessary for her to dispose of her separate interest in real estate.[29]

TENCH C. COXE, III

Torts—Emotional Distress—Negligent Infliction of Fear For Safety of Another

The evolution of recovery for emotional disturbance has been a slow and often illogical process. In order to observe briefly this development, the following categories of cases involving emotional disturbance should be considered: (1) assault on P; (2) intentional infliction of mental disturbance on P; (3) negligence toward P; (4) intentional tort toward another which is treated as negligence toward P; (5) negligence toward another which also is negligence toward P. Assault, as the first stage in this development, recognized a freedom from fear of immediate bodily harm.[1] Today there is a growing recognition of the intentional infliction of emotional distress as a tort in itself; and unlike assault, there is no

[27] It should be noted that N. C. GEN. STAT. § 39-8 (1943, recompiled 1950) permits the husband to join in the deed at a different time and place from the wife, so she may mail him the deed, requesting that he sign and mail it back. This, however, is at best a cumbersome and time-consuming procedure.

[28] See note 9, *supra.*

[29] The practice of permitting the husband to manifest his written assent to his wife's conveyances through his power of attorney provides a method which gives the wife complete freedom of transfer, *if she secures her husband's power of attorney.* A more direct method, and one which would give a married woman *absolute* freedom of transfer, would be provided by eliminating the joinder requirement altogether. In an era of substantially equal rights as between men and women in almost every respect, such a requirement is admittedly outmoded. It is to be hoped that the legislature will soon take the action necessary in order that the constitutional provision which makes the husband's written assent mandatory be submitted to the voters for possible amendment.

[1] I. de S. et ux. v. W. de S., Y. B. Lib. Ass., f. 99, pl. 60 (1348). This "hatchet" case is considered the historical origin of assault.